IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

**WRIT PETITION NO 1332 OF 1993**

Dhruvakumar Haribhau Gujrathi,
Occupation-business,
R/o Chiklikar Vada, Main Road, ..Petitioner
Nashik, Dist. Nashik. Orig. Deft.

V/s.
Dattatraya shankar Chikhlikar,
Occupation-service,
R/o Ozar, H.A.L. Colony, ..Respondent
Tal. Niphad, Dist.Nashik Orig. Plaff.

Mr. R.M. Haridas i/b Mr. Pramod N. Joshi for the petitioner.

Mr. S.M. Gorwadkar for the respondent.

**CORAM : ANOOP V.MOHTA J.**

**DATE : 19TH JULY, 2005.**

**ORAL JUDGMENT**

. The present petitioner tenant has invoked Article 227 of Constitution of India and sought to challenge the concurrent finding of facts, given by the Courts below, whereby, the respondent-landlord's suit for possession have been decreed on the ground of arrears of rent.

2. The premises in question are Municipal House No.25, situated at Nashik. The tenancy was monthly.

The rent was Rs. 11/- plus education cess. As per the respondents, the notice dated 30/3/1983 was issued under under certificate of posting. The petitioner-tenant in spite of the receipt of the notice failed to comply the same and therefore, the suit for possession was filed by the respondent in the Court of Jt. Civil Judge, J.D. Nashik (trial Court). The said suit was resisted by the defendant by filing Written statement and additional written statement. The evidence was led by the parties. The respondent examined himself. No postman was examined in the matter. The learned Judge after perusal of the material placed on the record granted the decree for possession. The Additional District Judge, Nashik (appellate Court) after considering the rival contentions between the parties, rejected the appeal. Therefore, the present writ petition.

3. Heard the learned Counsel Mr. R.M. Hardas, for the petitioner and the learned Counsel Mr. S.M. Gorwadkar, appearing for the respondent. The basic submission revolving around the issue i.e. whether in the facts and circumstances of the case, the issuance of the demand notice under certificate of posting, itself is a sufficient compliance as contemplated under the

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short Bombay Rent Act).

4. The law in this regard and the Apex Court's decisions are **1981 S.C. 1284 ( Har Charan Singh V. Shiv Rani and others), 1990 S.C. 1215 (Anil Vs. Nanak)** and **(2002) 1 S.C.C. 741 ( Fakir Mohd. V. Sita Ram)**. The relevant facets out of the Apex Court's decisions are as under ;

(a) the provisions of General Clause Act, Section 27 r/w section 114 of Evidence Act provide the presumption in favour of final act done by the postal department. (b) Issuance of the letters on the correct and given address, and once the letter is posted, the letters must have been reached to the addressee, **Har Charan Singh** (supra). (c) The concept of the presumption, always follow the concept of the rebuttal. (d) Such presumptions are always rebuttable. (e) The concept of rebuttable presumption always dependent upon the facts and circumstance of each case **Anil** (supra). (f) As already observed by the Apex Court **Fakir** (supra) that it is difficult to get the exact position in respect of such rebuttal. The situation and the position would be

always different. (g) One has to take in to consideration the facts and circumstances of each case as to whether such presumption have been rebutted with sufficient material on the record and whether there was proper discharge of the initial burden.

5. The learned Counsel, apart from the above Apex Court's decision has also, relied on **2002 (Supp.) Bom.C.R. 522 ( Parvatibai Maruti Hande V. Satish Mohanram Prajapati ), 2005 (1) Mh.L.J. 932 ( Ramavtar Ramashaya Khatod V. Baban Gurunath Pathari), 2001 (2) ALL.MR., 415 ( Lalmani Ramnath Tiwari V. Bhimrao Govind Pawar)**

6. The learned Counsel appearing for the respondent has relied on **AIR 1989 Bombay 410 ( Amrutlal Weljibhai Rathod V. Vishwarao Deorao Patil )** and supported the concurrent finding of facts and further submitted that no case of interference is made out, as the view taken by both the Courts is correct and therefore, it need to be maintained.

7. What is important now therefore is to see the facts and circumstances of the case. After going

through the material, as well as, the evidence led by the parties, there is no dispute that the postman was not examined by the parties. Apart from the denial in the written statement about the receipt of the notice in question, in the evidence also petitioner-tenants made the statement that no such notice was issued by the respondent. In addition to such denial, the petitioner placed on the record that because of his regular routine, he usually remained out of the residential premises from 9 a.m. to 9 p.m. His wife was also working with him. There were no one in the house during those working hours. There is nothing to destroy this evidence of the petitioner tenant. In the present case, petitioner has sufficiently rebutted the presumption of service (**Anil Vs. Nanak**). The Advocate led his own evidence, and placed on the record, the notice Exh.28 and seal of under certificate of posting Exh.29 to demonstrate that the said notice was sent on the correct address of the petitioner and therefore, the notice must had been reached to the addressee.

8. One additional facet in the matter cannot be over looked and that as per the Scheme of the Bombay Rent Act or for any other such legislation, the demand

of rent through a notice, goes to the root of the matter. Whenever there is a relationship of landlord and tenant and the moment there is a rent demand notice and
if it is duly served and or received by the tenant, the various obligations to comply with and/or to face the consequences of non compliance of such notice, follow. Therefore, such notice in given case itself goes to the root of the matter. In the present case, there is a denial of receipt of the notice.

9. As pointed out by the learned advocate appearing for the respondent that out of the three modes, if one mode is utilised by the landlord, it is permissible. The said mode like, under certificate of posting, needs presumption, as contemplated under Section 27 and section 114 of the Evidence Act. There are proper compliances. There are sufficient material on the record to justify that the said notice was sent to the addressee on the correct address and if there is no dispute about the address or addressee, the presumption should go in favour of the landlord **Har Charan** (supra) and **Amrutlal** (supra). However, in the present facts and circumstances of the case, and looking to the scheme ,

the heavy burden lies on the landlord to prove that the demand notice was duly received by the tenant. The posting of a letter is one important thing. But for the purpose of the scheme of the Act most important aspect is a proof and or unrebutted presumption of receipt of the notice and not only a issuance of the notice. The tenant in this case, rebutted the presumption by making a positive statement of non receipt of the said notice and also supported the same by the evidence. The postman was not examined by either of the parties. There was no other positive evidence of the landlord to support his case, (**Parvatibai** supra). In the present case, there is a concurrent findings in favour of the landlord on the presumption of service of notice as contemplated under the provisions of Section 27 of the General Clauses Act, as well as, of section 114 of the evidence Act. But in the facts and circumstances of the case, I am convinced that the presumption has been duly rebutted by the tenant. It is difficult in this background to accept that the notice in question was duly received by the tenant. I am of the view that no decree can be passed against the tenant unless it is proved that the rent default/demand notice was issued and duly received by the tenant. **Parvatibai, Ramavatar**

**& Lalmani** (supra). In the present case, service of demand notice only through the mode of service under certificate of posting is doubtful. No other mode of service was adopted.

10. If the notice was not received by the tenant, then there was no question of making payment, as contemplated under the Act. The provisions of Bombay Rent Act therefore, cannot be said to be breached by the tenant.

11. Taking into account aforesaid facts and circumstances, the landlord failed to prove that notice in question was duly served and in the result, there was no valid notice as contemplated under the Bombay Rent Act, there is no question of passing the decree for eviction, as granted by the trial Court and confirmed by the appellate Court.

12. For the above reason, I am of the view that the petitioner has made out a case for interference and, therefore, the impugned judgment dated 25/1/1993 passed by the appellate court and the judgment and order dated 15th October, 1987, passed by the trial Court are

quashed and set aside. The respondent's suit for possession is dismissed. The petition is allowed. Rule made absolute. There shall be no order as to cost.

**[ANOOP V. MOHTA, J.]**